STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal form the Court of Appeals
Christopher M. Murray, P.J., Jane E. Markey,
Peter D. O'Connell, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

JAMES RICHARD LARGE,

Defendant-Appellee,
_____/

Supreme Court No. 127142

COA No. 253261

Jackson County Circuit Court
No. 03-0895-FH

Jackson County Prosecuting Attorney
Attorney for Plaintiff-Appellant

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_____/

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. IS THIS COURTS HOLDING IN PEOPLE v LARDIE, REQUIRING A SHOWING OF PROXIMATE CAUSATION BETWEEN AN ACCUSED'S INTOXICATED DRIVING AND AN INDIVIDUAL'S DEATH, CONSISTENT WITH MCL §257.625(4)?

Defendant/Appellee Answers: YES
Plaintiff/Appellant Answers: NO

II. WHERE THE PROSECUTION'S TRAFFIC ACCIDENT RE-CONSTRUCTION "EXPERT" TESTIFIED THAT DEFENDANT-APPELLEE JAMES LARGE'S COLLISION WITH A BICYCLIST WHO DARTED OUT FROM A HIDDEN DRIVE WAS *UNAVOIDABLE,* IRRESPECTIVE OF HIS 0.10% BLOOD ALCOHOL LEVEL, AND *FAILED* TO PRODUCE *ANY* EVIDENCE SHOWING THAT DEFENDANT LARGE'S DRIVING WAS OTHERWISE GROSSLY NEGLIGENT AND *PROXIMATELY CAUSED* THE FATALITY, DID THE CIRCUIT COURT CORRECTLY REFUSE TO HOLD DEFENDANT-APPELLEE OVER FOR TRIAL ON THE BOTH THE MCL §257.625(4), AND THE INVOLUNTARY MANSLAUGHTER COUNT?

Defendant/Appellee Answers: YES
Plaintiff/Appellant Answers: NO

COUNTER-STATEMENT OF FACTS

This appeal represents the government's attempt to prosecute Defendant-Appellee James Large on charges of involuntary manslaughter and operating a motor vehicle with an unlawful blood alcohol level causing death. The district court bound over the involuntary manslaughter count only. The circuit court quashed the bindover on the involuntary manslaughter count and denied the reinstatement of the statutory OUIL causing death charge. The Court of Appeals granted the prosecution's interlocutory application for leave to appeal, and affirmed. This is a child dart-out case.

On July 16, 2003, approximately 4:00 p.m., Defendant-Appellee James Large traveled eastbound in his truck on Cain Road, Jackson County. (31a) On this day, the sisters Otto, Cody and Amy, were feeding the family dogs near the top of the drive. (111a-112a) This drive is on the north side of Cain Road. It is a hidden gravel driveway that leads up a hill to the home of the Otto family. (197a). This drive is obscured from the vision of traffic on Cain Road as it is cut into a hill. (197a). And, on this day, there was a growth of vegetation on that hill, further obscuring vision. (197a). See, Photographs of driveway, People's Exhibit 7. (3b-4b). After feeding the dogs, Amy, an eight year old, got on and rode her bicycle down the driveway hill, riding her bicycle onto the northern side of Cain Road.(112a-113a; 117a-119a). Amy

saw James Large's truck approaching from the west. Amy said to her eleven year old sister: "Stop, Cody." (116a). Cody did not pay heed to this warning. She got on her bicycle.

Cody Otto rode down the hidden driveway on her bike. The bike did not have brakes. (130a). Cody didn't stop on the north side of Cain Road. *Cody rode her bike across Cain Road . . . into the path of James Large's vehicle.* (130a-131a). James Large swerved to his right in attempt to avoid Cody. (36a). The two collided approximately two to three feet past the center line of the road, in Mr. Large's lane of travel. (131a; 88a-89a). Cody hit the front drivers side of James Large's truck. Her head hit the driver's side mirror. (211a-212a). Mr. Large continued off the road on the south side, side-swiped a tree, got back on the road, and went to the stop sign where he immediately turned around and came back. (116a-117a). A horrible, fatal, accident had just occurred. Defendant-Appellee Mr. Large had .10% blood alcohol at the time of the accident. (154a-156a).

For Mr. Large, irrespective of .10% blood alcohol level, all of the testimony suggests that this accident was unavoidable. The prosecution offered Deputy Bradley Piros as an "expert" in accident re-construction at the preliminary examination. (79a). Relative to the *cause* of the accident, he testified:

> Q. Deputy, I would remind you, sir, that you're still under oath. Sir, when you were last testifying we were at the point in your testimony when we were discussing these tests that you performed using a similar bike going down

the hill that the victim Cody Otto went down prior to being struck by Mr. Large's car. Do you recall that testimony?

A. Yes, I do.

* * *

Q. All right, I apologize. I stand corrected. And did you come up with a approximate speed of the bicycle that Cody was riding when she entered the roadway?

A. Yes, we did.

Q. And what was that speed?

A. Average speed over the distance that we used was approximately nine miles an hour.

Q. Okay. Now, on the diagram did you measure the edge of the road in front of the driveway to the area of impact? The distance that Cody traveled from the edge of the road to the area where she was struck by the truck. Was that distance measured?

A. I don't recall if we actually measured that distance out or not. I know the approximate distance that it was.

Q. What's the approximate distance?

A. Approximately thirteen feet.

Q. And a person traveling at nine miles per hour from the edge of the driveway to the area of impact, how much time transpired from the time that Cody reached the edge of the road until the point she was struck by Mr. Large's truck?

* * *

THE WITNESS: Using the distance of approximately thirteen feet and the speed of nine miles an hour, which if you calculate it in feet per second would be a little over thirteen feet, so approximately one second.

Q. So that calculation basically says from the time Cody reaches the edge of the road until the point she's hit, covering that, traversing that thirteen feet would take

approximately a second.

A. Correct.

Q. Now, did you make any observations of the driveway that Cody went down before she got hit?

A. Yes, I did.

Q. On the day of the crash?

A. Yes, I did.

Q. And do you have an opinion as to whether or not a driver driving the direction that Mr. Large's vehicle was driving would have been able to see Cody coming down the driveway prior to her entering the edge of the roadway?

A. No, I don't believe so.

Q. And why would it be impossible or difficult for a driver to see Cody coming down the driveway?

A. The fact that it's a steep driveway cut into a hill and the vegetation and growth, the trees around it, it would be near impossible to see her.

* * *

Q. Did you crunch any numbers to determine had Mr. Large slowed down his car to forty-five miles an hour and then Cody come out of the driveway, did you crunch any numbers or make any determinations as to whether or not the crash would have happened?

A. Yes, the crash would have still occurred.

Q. How about fifty miles an hour, fifty-five, sixty, sixty-five?

A. Yes.

Q. Yes what?

A. It would still have occurred.

* * *

Q. Now, as an accident reconstructionist, have you had any training as to the amount of time it takes a prudent driver to react to a threat on the roadway?

A. Yes.

Q. And based upon that training, what is your understanding of the time it takes for a sober driver to perceive a threat on the roadway?

A. Normal perception reaction time in order to see a threat, realize you have a threat and then decide what you're going to do is around a second and a half.

Q. And your tests indicated that Cody came out and got hit in less than a second.

A. Correct.

* * *

BY MR. KOBRIN:

Q. Deputy, just to clear up a few questions. When you talk about this 9.39, I think you measured it 9.39 average speed. Is that a fair statement?

A. Correct.

Q. Okay. That's not necessarily and probably isn't a true representation of what the vehicle speed would be at the bottom of the hill as it was entering the roadway, is it? Because you're averaging the slow with the fast, is that a fair statement, sir?

A. Yes, that's correct.

Q. And isn't it true that the speed at the time the bicycle would have been entering the roadway could be fifteen miles an hour. Is that not true?

A. I would say at the very most fifteen.

Q. Okay. So if we take an --- a fifteen mile an hour speed, that would go even faster than it would be at 13.8 feet per second. Is that not true?

A. That's correct.

Q. Okay. So it becomes even more emphatic when you actually consider the terminal speed as opposed to the average speed. Is that a fair statement, sir?

A. Yes, it is.

Q. And if I correctly understand your testimony, sir, because of the location of the driveway, the vegetation, the incline and the fact that the driveway is carved out of mounds of dirt or a wall of dirt, this accident was going to happen virtually at any speed, forty-five to sixty-five or seventy-five miles an hour. Is that not true?

A. Yes, it's true.

Q. And isn't it true that it may have been even at a speed lower than that if you consider the fifteen mile an hour terminal velocity at the time you enter the roadway from the driveway. Is that not true?

A. It's possible, yes.

Q. Now, from your expert analysis, in terms of the strict operation of the motor vehicle, it's a fair statement to say you found no, no deviation from the normal driver in terms of the Large vehicle. Is that a fair statement, sir?

A. Other than ----

Q. I'm not talking about the alcohol, I'm talking about the operation of the motor vehicle.

A. Other than the alcohol, no.

Q. So in terms of final summary. Other than the allegation of drinking, you see absolutely no negligence on behalf of Mr. Large. Is that a fair statement?

A. That would be a fair statement.

(195a-207a).

The District court never made a specific finding on the record as to whether evidence of each element of involuntary manslaughter

existed. Nevertheless it bound over on that count, and refused the bind over on the statutory count. (222a-223a). Both parties filed motions in the circuit court. The prosecution sought to reinstate the OUIL causing death and the Defendant-Appellee sought to quash the involuntary manslaughter count. The Circuit court, following argument on December 2, 2003, issued its written opinion and order on December 18, 2003. The Circuit court, Chad Schmucker, J., held that the district court abused its discretion in failing to acknowledge that a causation element exists in the homicide charge, and given the total lack of evidence on this issue quashed the information. Likewise, Judge Schmucker denied the prosecution's motion to reinstate the statutory count. (227a-231a).

The prosecution filed its Interlocutory Application for Leave to Appeal on January 5, 2004. The Court of Appeals granted leave on February 11, 2004. Following briefing and oral argument, the Court of Appeals unanimously affirmed. (233a-236a). The prosecution then filed its timely Application for Leave to Appeal to this Court.

This Court Granted Leave to Appeal on November 29, 2004. (237a).

SUMMARY OF THE ARGUMENT

Defendant-Appellee asserts that People v. Lardie, 452 Mich 231; 551 NW2d 656 (1995) provides a proper interpretation of MCL 257.624(4), consistent with its language. Notably, the statute has been amended seven times since Lardie's announcement, and while our Legislature has fine-tuned other subparts of the statute, it has left subsection four (4) consistent with the language interpreted in Lardie. Our Legislature surely is aware of this Court's interpretation requiring proximate causation going to the *intoxicated driving*, and not merely the *operation* of a motor vehicle, and has done nothing. The continued acquiescence to this Court's interpretation in Lardie strongly suggests that it is in accord with the our Legislature's intent. Indeed, at this point, any expansion of the scope of potential criminal liability under the statute could easily be seen as an exercise of judicial activism. Any change of the statute, in favor of the prosecution, must come from our Legislature.

This Brief argues that interpretation of the statute to eliminate the causation element, and adopt a mere but-for causation element, would exceed the constitutional due process limitation that the People have placed on our government, and be contrary to our deeply established common-law understanding of criminal causation. Further, elimination of a proximate cause nexus between an accused's *drunken* driving, and not just his/her

"operation of a motor vehicle" will offend our common-law understanding of "the basic premise of individual moral culpability that our criminal law is based upon."

This Court has recognized that this common-law principle is at least as stringent as what substantive due process may require. As the precise threshold of any such due process limitation is largely undefined, this Court should prudently avoid reaching it in the absence of clear legislative intent otherwise. Here, this statute, subject to more than one interpretation, is not so clear as to require this Court to grapple with such solemn duty.

Factually, this is a child dart-out case. Defendant-Appellee's involvement in this horrible accident was due to the unfortunate coincidence of time and place. A sober driver, traveling ten miles-per-hour under the speed limit would not have been able to avoid the accident. Legally, Defendant-Appellee's action can never be seen as a "cause" of the accident. Legally, Defendant-Appellee can not be held for trial under MCL 257.625(4), nor on the involuntary manslaughter charge.

The Court of Appeals must be affirmed.

I. THIS COURT'S HOLDING IN PEOPLE v LARDIE, REQUIRING A SHOWING OF PROXIMATE CAUSATION BETWEEN AN ACCUSED'S INTOXICATED DRIVING AND AN INDIVIDUAL'S DEATH, IS CONSISTENT WITH MCL §257.625(4)

A. The Lardie holding

People v. Lardie, 452 Mich 231, 551 NW2d 656 (1996) construed MCL 257.625(4) as promulgated by 1991 PA 98. The relevant substance of the applicable statute has not substantially changed since, notwithstanding the fact that our Legislature has amended the statute eleven times since it was enacted in 1991 - and *seven* times since this Court's Opinion in Lardie.[1]

The statutory language construed in Lardie read, in pertinent part:

> A person, whether licensed or not, who operates a motor vehicle upon a highway ... under the influence of intoxicating liquor or a controlled substance, ... or with a blood alcohol content of 0.10% or more by weight of alcohol, ***and by the operation of that motor vehicle causes the death of another person is guilty of a felony,*** punishable by imprisonment for not more than 15 years,....

The statutory language this Court will construe reads, in pertinent

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[1] ...;-- Am. 1991, Act 98, Eff. Jan. 1, 1992 ;**(1)**-- Am. 1993, Act 359, Eff. Sept. 1, 1994 ;**(2)**-- Am. 1994, Act 211, Eff. Nov. 1, 1994 ;**(3)**-- Am. 1994, Act 448, Eff. May 1, 1995 ;**(4)**-- Am. 1994, Act 449, Eff. May 1, 1995 ; ***Lardie*** **(5,1)**-- Am. 1996, Act 491, Eff. Apr. 1, 1997 ;**(6,2)**-- Am. 1998, Act 350, Eff. Oct. 1, 1999 ;**(7,3)**-- Am. 1999, Act 73, Eff. Oct. 1, 1999 ;**(8,4)**-- Am. 2000, Act 77, Eff. Oct. 1, 2000 ;**(9,5)**-- Am. 2000, Act 460, Eff. Mar. 28, 2001 ;**(10,6)**-- Am. 2003, Act 61, Eff. Sept. 30, 2003 ;**(11,7)**-- Am. 2004, Act 62, Eff. May 3, 2004

part:

> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [under the influence of intoxicating liquor], (3) [a person's ability is visibly impaired because of intoxicating liquor], or (8) [a person has any amount of schedule 1 controlled substances in their body] ***and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows***:
>
> (a) Except as provided in subdivision (b), ***the person is guilty of a felony*** punishable by imprisonment for not more than 15 years ....

In Lardie, the OUIL causing death statute was challenged as being a strict liability crime exceeding the state and federal due process limitations that the People have placed on our Legislature. The full Court concluded that this enactment was not a strict liability statute inasmuch as there was a mens rea requirement involving at least one element, the decision to drive while intoxicated.

The Court concluded that in enacting the OUIL causing death statute, our Legislature intended enact a law *similar* to involuntary manslaughter, but to eliminate gross negligence as a question of fact for the jury. Lardie, 452 Mich at 249. Significantly, common-law involuntary manslaughter requires a substantial causal nexus between the gross negligence [here, the *intoxicated driving*] and the injury resulting in death.

In so construing the statute, the Lardie Opinion held three main points: (1) the statute does not impose strict liability, Lardie, 452 Mich at 256; (2) the statute requires proximate

causation element going to the *intoxicated driving*, Lardie, 452 Mich at 257-258; and, (3) that the statute, as construed in parallel with common law involuntary manslaughter does not violate due process in light of common-law "individual moral culpability" benchmark which is at least as stringent as the standard of basic fairness that might be required by substantive due process. Lardie, 452 Mich at 262, fn. 54, 265

Plainly evident from the Lardie Opinion is the overarching goal that the Court sought to honor in analytically aligning the statute with the common-law involuntary manslaughter construct. That goal was to respect the basic premise of "individual moral culpability" upon which our criminal law is based:

> In comparing this statute to gross-negligence involuntary manslaughter under the common law, we conclude that this statute does not conflict with the basic premise of "individual moral culpability" from the common law articulated in *Aaron* even though it imposes a fifteen-year felony for an act that would only lead to a ninety-day misdemeanor (for a first-time offense) if it did not cause the death of another.

Lardie, 452 Mich at 265. Requiring a causal nexus between the wrong (intoxicated driving) and the injury (death) satisfies this concept. *Moreover, the causal phrase "and by the operation of that motor vehicle" necessarily means* ***intoxicated operation****, by force of plain logic -- under the statute it is a necessary antecedent.*

The Lardie Court did acknowledge the concurring opinion's assertion that drunk driving deaths are always avoidable, simply by not getting behind the wheel, yet wrote:

> However, ***this interpretation eliminates any substantial connection between the fault and the resulting death.*** The Legislature seeks to prohibit intoxicated driving because of the danger that such driving poses to the safety of the community. The concurrence would allow the statute to impose this fifteen-year penalty when that fault played no role in causing the accident, permitting the driver's fault to be merely coincidental with the victim's death.
>
> We agree with the concurrence that "the Legislature drafted the statute so that the intoxicated driver would be responsible for *all* consequences that flow from his decision to drive while intoxicated." Slip op at 12. We further conclude, however, that a victim's death was one of the consequences of a driver's decision to drive while intoxicated *only* when the driver's intoxication was a cause of that death. This is the crime that merits swift and sure punishment, not the unavoidable killing of another with a vehicle.

Lardie, 452 Mich at 258, fn. 48 (emphasis added). Moreover, this Court wrote:

> The Legislature passed *1991 PA 98* in order to reduce the number of alcohol-related traffic fatalities. The Legislature sought to deter drivers who are "willing to risk current penalties" from drinking and driving. In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their drunken driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. ***Such an interpretation of the statute would produce an absurd result[2] by divorcing the defendant's fault from***

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[2] The prosecution argues that this Court "disavowed" such analysis in People v. McIntire, 461 Mich 147; 599 NW2d 102 (1999). The Court did not "disavow" such analysis. According to the American Heritage Dictionary of the English Language, 3rd Edition, page 529, "disavow" is defined as "To disclaim knowledge of, responsibility for, or association with." The McIntire Court simply explained the correct application of the absurd result rule. McIntire, stands for the proposition that a court follow the plain language of a statute, unless the language is *ambiguous* - even if the literal reading produces what the court would see as an absurd

> ***the resulting injury.*** We seek to avoid such an interpretation. See *Jennings v Southwood, 446 Mich 125, 141-142; 521 NW2d 230* (1994).

Lardie, 452 Mich at 256-257 (internal footnotes eliminated).

Thus, Lardie held that the statutory language ***"and by the operation of that motor vehicle causes the death of another person"*** requires a showing of causation as it was developed in the context of common-law involuntary manslaughter -- that the wrong [intoxicated driving] be "a substantial cause" of the death. In satisfying causation, the Lardie Court appears to have focused on both aspects of the wrong, intoxication and driving, requiring a causal connection to both:

> Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim.

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result. McIntire does not shackle a court from its constitutional duty of interpreting an ambiguous statute, however. Rather, McIntire only mandates that a court must precisely identify the ambiguous terms or phrases in the text of a statute before attempting to "divine" the Legislature's intent behind the words. McIntire, 461 Mich at 155, 56.

The statute is not a model of clarity. The Lardie court, itself acknowledged that the language of the statute was unclear:

> Contrary to the concurrence's suggestion, the statute may easily support the interpretation that the driver's intoxication, rather than the mere operation of the vehicle, must be the cause of the victim's death.

Indeed, the very fact that there were two different interpretations of the statute in the Lardie opinion itself is good evidence of the ambiguous nature of the statutory language. Thus the prosecution's argument stumbles out of the gate.

Lardie, 452 Mich at 258. Further, the court noted, "It is the change that such intoxication produces, and whether it caused the death, which is the focus of this element of the crime." Lardie, 452 Mich at 258, fn. 47.

B. The Lardie concurring opinion rests only on an absolute liability but-for, cause-in-fact, test

The concurring opinion in Lardie sought to limit the "causes" language to a but-for, cause-in-fact analysis which would find liability for *all deaths resulting from intoxicated driving*, ignoring all proximate/legal causation issues entirely. The Lardie concurrence flirts with the idea that the causal language nexus is limited to the operation of a vehicle, and not the effect of intoxication, but in the end its analysis results in only a but-for test, period. Justice Weaver wrote:

> Rather, I would find that the causation element requires the people to prove that the death ***resulted*** from the defendant's commission of the culpable act prohibited by the statute, which occurs when "a person becomes intoxicated and then decides to drive," and actually does so.

Lardie 452 Mich at 269 (emphasis added). The sleight of hand in Lardie's concurring opinion is hidden in its footnote 5:

> It is unnecessary to impose the common-law interpretation of the causation element in criminal negligence offenses, as further defined in *People v Kneip, 449 Mich 83; 534 NW2d 675 (1995)*, because the plain language of this OUIL causing death statute clearly defines the causation element, including the "scope and necessary connection between the act and the injury . . . ." Id. at 95.

Lardie, 452 Mich at 269, fn. 5.

If the "operation" of a motor vehicle is seen to be "a cause" of a death, instead of "a substantial cause," in a crime where intoxicated driving is *always* involved, the causation element will *always* be satisfied, a fortiori. So, the Lardie concurrence *really* stands for the proposition that a but-for analysis of causation is the end-all test of causation regarding this statute. Indeed, Justice Weaver wrote: "In enacting the statute, the Legislature sought to prohibit and punish *all* intoxicated driving that ***results*** in a fatality." Lardie 452 Mich at 275 (emphasis added).

The Lardie concurrence would eliminate the common-law meaning of causation, and its nexus between fault and culpability. The Lardie concurring opinion would find liability in *all* deaths involving intoxicated driving. Defendant-Appellee asserts that the Lardie majority properly construed the statutory causal language *"and by the operation of that motor vehicle causes the death"* consistent with our common-law involuntary manslaughter tradition. On the other hand, the Jackson County Prosecutor appears to assert, consistent with the Lardie concurrence, that the statute merely requires a "cause in fact," but-for causation analysis; arguing that ordinary dictionary meaning of "cause" is very broad. [Jackson County Brief on Appeal, p. 4]. However, to their credit, the Jackson County Prosecutor does appear to back off from such absolute construction and appears to concede that there is a limit

on its cause-in-fact liability, based on what it terms as "foreseeability." [Jackson County Brief on Appeal, p. 5]. Nevertheless, it argues that this Court should adopt the concurrence of Lardie, eliminating any causal nexus tied to *intoxication*. [Jackson County Brief on Appeal, p. 11].

C. The statute's causation language is ambiguous and must be construed in favor of the accused, consistent with the Lardie majority, requiring more than a cause-in-fact test

As it is, what our legislature meant by ***"and by the operation of that motor vehicle causes the death of another person"*** created a sharp disagreement in Lardie. The phrase, and the term "*causes*," are not plainly clear: cause-in-fact alone, or something else? It is easily open to more than one interpretation. The Lardie court split over it, and we are again arguing over what it stands for. It is ambiguous.[3]

At the outset, Defendant-Appellee asserts that the word ***"causes"*** as used in the statute is a "term of art" in the law that defies precise definition and must be referenced as it exists in the common-law.[4] Our Legislature's choice to use a legal "term of

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[3] The American Heritage Dictionary, 3rd ed., p. 58, defines "ambiguous" as: "1. Open to more than one interpretation. 2. Doubtful or uncertain."

[4] This, is in accord with the Wayne County Prosecutor's Brief, p.7, citing Nugent v. Ashcroft, 367 F3d 16, 170 (Cir. 3, 2004); Moskal v. United States, 498 US 103, 114; 111 SCt 461; 112 Led2d 449 (1990); Gilbert v. United States, 370 US 650, 655; 82 Sct 1399; 8 Led2d 750 (1962); Silver Creek Drain Dist. v. Extrusions

art" in specifying the required nexus between the prohibited act, drunk driving, and death, and not language such as "resulted" [see, Lardie concurrence] indicates that our Legislature intended the causal language to comport with our common-law causation principle -- which requires a two-part cause-in-fact and proximate/legal cause analysis.

The causal language of similar statutes in other states has been a hotbed of litigation, too. Florida provides a good example. Florida grappled with the same causation issues this Court faced in Lardie, involving similar statutory language, resulting in finding a proximate cause element. In 1977 the Florida OUIL causing death statute provided:

> 316.1931 Driving automobile while intoxicated; punishment. --
>
> (1) It is unlawful for any person, ... to such extent as to deprive him of full possession of his normal faculties, to drive, be in actual physical control of, or operate within this state any automobile, truck, motorcycle, or other vehicle. . . .
>
> (2) . . . .
>
> (c) **If the death of any human being is caused by the operation of a motor vehicle by any person while so intoxicated,** such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law relating to manslaughter.

The statute was interpreted to neither require negligence nor

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Div., Inc., 468 Mich 367, 376 (2003)(words that fall into that category ... as technical legal terms or phrases of art in the law ... are to be given the meaning that those sophisticated in the law gave them at the time of enactment").

proximate causation as elements. State v. Baker, 377 So2d 17, 19-20 (FL 1979). However, the Florida Legislature amended the statute in 1986 to read:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
>
> (a) ... when affected to the extent that his normal faculties are impaired;
>
> . . . .
>
> (3) Any person:
>
> (a) Who is in violation of subsection (1);
>
> (b) **Who operates a vehicle; and**
>
> (c) **Who, by reason of such operation, causes:**
>
> 3. **The death of any human being is guilty of DUI manslaughter, a felony** of the second degree,....

(316.193 Fl, 1986, emphasis added). Note the similarity to the causal language in our statute: "***and by the operation of that motor vehicle causes the death of another person.***"

Not surprisingly, a defendant contended that the Florida legislature injected an element of causation to the crime, whereas the state suggested that the amendment was merely cosmetic and made no substantive changes. The Florida Court, in State v. Magaw, 537 So2d 564, 566 (FL, 1989), wrote:

> **There is some merit in both arguments because the meaning of the statute both before and after the amendment has not been entirely clear.** In order to convict under the

> new statute, it is necessary to prove that the operation of a vehicle by a person under the influence caused the death of another, thereby suggesting the requirement of causation. On the other hand, the old statute which provided for conviction if the death of any human being was caused by the operation of a motor vehicle by an intoxicated person has been consistently construed as not requiring proof of causation.

(emphasis added). The Magaw Court went on to state:

> ***We conclude that the 1986 amendment introduced causation as an element of the crimes proscribed by section 316.193(3).*** We caution, however, that the statute does not say that the operator of the vehicle must be the sole cause of the fatal accident. Moreover, the state is not required to prove that the operator's drinking caused the accident. The statute requires only that the operation of the vehicle should have caused the accident. *Therefore, any deviation or lack of care on the part of a driver under the influence to which the fatal accident can be attributed will suffice.*

Magaw, 547 So2d at 567 (emphasis added, internal footnotes omitted). Following this interpretation, defendants contended that an element of *negligence* must be shown in addition to causation. That issue reached the Florida Supreme Court *again* in State v. VanHubbard, 751 So2d 552 (FL 1999). The VanHubbard Court went through the history of its decisions and concluded that there was no separate negligence element in the statute. The VanHubbard Court declined to find that the legislature added a separate negligence element:

> Although in Magaw the court elaborated on the meaning of the term "caused," we do not construe that opinion as requiring that the standard instruction be broadened to specify lack of care as a distinct element. For example, based on the standard instruction, **if the jury concluded that someone else had caused the death, perhaps another**

> **driver, Melvin would be found not guilty. Similarly, if the death was the result of factors beyond Melvin's control, he would be not guilty. Either of these scenarios, not involved here, would preclude a finding of causation and result in a defendant's acquittal as a defendant may be convicted only on proof of causation.**

VanHubbard 751 So2d at 559 (emphasis added).

The VanHubbard Court touched upon the implicit and confounding overlap of negligence and causation principles. However, clarifying the causation element's causal interplay with the absence of any negligence in the manner of driving, the court wrote:

> Further, Benoit underscores the importance of the causation element: the defendant's operation of his or her automobile must cause the accident. **There, the court determined that a [sic] undisputably drunk driver who, through no misoperation of his own, was struck by another car resulting in the death of another person, cannot be found guilty of DUI manslaughter because the operation of his vehicle did not cause the victim's death. *Benoit, 650 A.2d at 1234.*** The Fourth District recognized that a defendant could not be convicted under such circumstances: "If the jury concluded that someone else had caused the death, perhaps another driver, Melvin would be found not guilty." *Melvin, 677 So. 2d at 1318.* **The court also concluded that "if the death was the result of factors beyond Melvin's control, he would be not guilty." Id.** In so finding, the Fourth District applied the essential holding in Magaw that the Legislature's 1986 amendments to the DUI manslaughter statute introduced causation as an element of the crime.

VanHubbard, 751 So2d at 563-564 (emphasis added).

In State v. Benoit, 650 A2d 1230 (1994), cited in VanHubbard, the Rhode Island Supreme Court was called to interpret their OUIL causing death statute. Benoit was driving, intoxicated, on a

divided highway. Another vehicle in the oncoming lanes crossed the median and struck Benoit in his lane, the passenger in the oncoming vehicle died as a result. The government argued that criminal culpability results when a death occurs and the defendant's blood-alcohol level exceeds the legal limit, whether or not the defendant's operation was a proximate cause of the fatality. Benoit, 650 A2d at 1233. The applicable statute, in pertinent part, read:

> When the death of any person other than the operator ensues as a proximate result of an injury **received by the operation of any vehicle**, the operator of which is under the influence of, any intoxicating liquor ... the person so operating such vehicle shall be guilty of "driving under the influence of liquor or drugs, resulting in death."

(Benoit, 650 A2d at 1231, emphasis added). Explaining the causal nexus, the Benoit court opined:

> As the trial justice noted below, if a person were driving while legally intoxicated and an airplane suddenly plunged from the sky into the driver's motor vehicle, killing the pilot, the driver would be criminally culpable, according to the state's interpretation. *It is well settled that this court will not attribute to the Legislature an intent that leads to an absurd or unreasonable result....* We believe the trial justice's hypothetical points out just one of the many *unreasonable and absurd results* that could occur under the state's interpretation that no proximate cause is required.

Benoit, 650 A2d at 1233 (emphasis added, internal citation ommited). Further, the Benoit Court wrote:

> We note that the amount of human carnage resulting from alcohol-related motor vehicle accidents is horrific. In 1992 an estimated 17,699 people died in

> alcohol-related traffic accidents. Amicus curiae submitted by Mothers Against Drunk Driving, Rhode Island Chapter, quoting the National Highway Traffic Safety Administration, "Traffic Safety Facts," iv-37 (1992). At some point during their lives, two out of every five Americans will be involved in an alcohol-related accident. Id. **However, despite these alarming statistics no state in the nation has done away completely with concepts of proximate cause and causation in statutes which criminalize driving under the influence of alcohol resulting in death or serious injury.** For a collection of cases dealing with proximate cause See Randy R. Koenders, Annotation, Alcohol-Related Vehicular Homicide: Nature and Elements of Offense, 64 A.L.R. 4th 166, VII (1988). Even the states with the most lenient proximate cause requirements still require the prosecution to show that the defendant's ***manner of operating*** his or her vehicle caused the injury or death. See e.g., State v. Nelson, 119 Idaho 444, 446, 807 P.2d 1282, 1284 (1991) (causation must be shown only between driving and great bodily harm); Micinski v. State, 487 N.E.2d 150, 154 (Ind. 1986) (causal link between only manner of driving and death or injury needed); State v. Caibaiosai, 122 Wis. 2d 587, 594, 363 N.W.2d 574, 577 (1985) (state does not have to prove direct causal link between a defendant's intoxication and the death but rather a causal connection between the operation of the vehicle and death).

Benoit, 650 A2d at 1231-32 (emphasis added). Note the court's use of the term "manner of operation," again conflating issue of proximate cause with the metaphysical concept of negligence. Nevertheless, the concept of proximate/legal cause is highlighted.

Moreover, like the Benoit court, Defendant-Appellee Large can find no state that has totally done away with the concept of proximate causation in their OUIL causing death statutes, nor has the Jackson County Prosecutor cited any such authority.

The Michigan judiciary should not lead the way -- If the People of Michigan desire such strict, absolute liability,

draconian laws, they must come from our Legislature through the political process.

Moreover, what can be taken from Florida and Rhode Island's experiences are that these statutes are inherently vague and ambiguous. Michigan courts strictly construe vague criminal statutes in favor of the defendant. In People v. Gorney, 99 Mich App 199, 206, 297 NW2d 648 (1980), the panel wrote:

> It is a familiar rule of statutory construction that criminal statutes must be strictly construed. This principle requires that doubtful conduct be found not criminal. In large part, the principle is based on the idea of notice of prohibited acts, but it also reflects the idea that it is up to the Legislature to define criminal offenses and punishment. Restraint by the courts in interpreting criminal statutes works to avoid judicial infringement of that legislative function. Finally, strict construction serves to guard against the dangers of arbitrary and discriminatory application of otherwise vague legislative pronouncements. People v. Willie Johnson, 75 Mich App 221, 224- 225, 255 NW2d 207 (1977).

Here, this Court should refuse to eliminate the statute's causation element, as interpreted in Lardie.

D. Interpretation of the statute's causal language requiring a nexus between the *intoxicated* driving and the death comports with our common-law jurisprudence and avoids potentially serious state and federal due process problems.

The question then becomes: is the statute's causal language clear and unambiguous; so as to find that our Legislature intended merely a cause-in-fact, but-for, analysis, ignoring the legal significance of the word "causes" and its complex common-law

meaning and application in our criminal law? And, if a majority of *this Court* is to so conclude, contrary to its opinion in Lardie, would such construction involve and exceed any constitutional limitations placed upon our Legislature (*Court?*) by our state and/or federal Constitutions?

Not knowing the precise contours of any constitutional limitation, "the existence of constitutional constraints on the substantive criminal law is largely *terra incognita*,"[5] the Lardie Court prudently avoided reaching, *and resolving*, any such constitutional limitations by interpreting the criminal statute consistent with common-law development. The Lardie Court astutely noted:

> We do not intend to suggest that these common-law cases establish the proper framework for evaluating a criminal statute with a mens rea requirement under due process. In Aaron and Datema, we reexamined the common-law definitions of murder and manslaughter under our authority in developing the common law, abrogating felony-murder but retaining a certain kind of misdemeanor-manslaughter rule. **In doing so, we required that the common-law definitions meet the requirements of "individual moral culpability" found in the criminal law, see *Aaron, supra at 733*, which we conclude is at least as stringent as the standard of basic fairness that might be required by substantive due process.** See *Cordoba, n.52 supra*. Consequently, by concluding that this statute is consistent with Michigan common-law principles, we avoid determining what the due process limitations are, if any, on a criminal statute that requires proof of a mens rea.

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[5] Caibaiosai v. Barrington, 643 FSupp 1007, 1012 (WD Wis., 1986)(quoting, Jeffries and Stephan, Defenses, Presumptions and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1366 (1979).

Lardie, 452 Mich at 262, fn. 54 (emphasis added)(internally citing to United States v. Cordoba-Hincapie, 852 FSupp 485 (ED NY, 1993)(containing a wide survey of criminal culpability concepts from Plato to present times, and their constitutional implications).

The defendant in Lardie challenged the statute as violating due process claiming that it violated "the basic premise of individual moral culpability that our criminal law is based upon." Again, the Lardie Court considered this benchmark to be at least as stringent as what due process may require. Lardie, 452 Mich at 262, fn 54. Citing to this Court's abrogation of the common-law felony-murder rule in People v. Aaron, 409 Mich 672; 299 NW2d 304 (1980) and this Court's examination of the misdemeanor-manslaughter rule in People v. Datema, 448 Mich 585; 533 NW2d 272 (1995). In light of Aaron, defendant Lardie argued that the general intent to commit a misdemeanor (the mens rea) cannot be *transformed* into the bad intent sufficient for due process purposes to justify a fifteen-year felony, unless the government can demonstrate that this culpable decision/act (intoxicated driving) was the proximate cause of the victim's death. The Lardie Court concluded that the statute, *as construed*, was consistent with its decisions in Aaron and Datema.

In Aaron, this court struck down the common-law felony-murder rule because it violated "the basic premise of individual moral

culpability upon which our criminal law is based," by allowing proof of an intent to commit a felony as adequate to establish a defendant's liability for murder. This Court wrote:

> We conclude that Michigan has no statutory felony-murder rule which allows the mental element of murder to be satisfied by proof of the intention to commit the underlying felony. Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule. We hold that in order to convict a defendant of murder, as that term is defined by Michigan case law, it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm. We further hold that the issue of malice must always be submitted to the jury.

Aaron 409 Mich at 733.

Similarly, in Datema, this Court examined the misdemeanor-manslaughter rule, which elevates a misdemeanor to involuntary manslaughter if that wrongful act causes another's death, in a case in which a defendant committed an assault and battery that unexpectedly resulted in the death of the victim. This Court upheld the common-law misdemeanor-manslaughter doctrine under the facts of the case because (1) "[the] rule requires a jury finding beyond a reasonable doubt that there was a direct and proximate connection between the underlying crime and the resulting death" and (2) assault and battery, the underlying misdemeanor, was "a specific-intent crime" in which the people must prove that the defendant had the "intent to injure." Datema, 448 Mich at 602. Here, the underlying OUIL is not "a specific-intent crime," like

assault and battery; and, therefore, the prosecutor would not be required to establish a causal relationship between the defendant's culpable state of mind [or fault] and the resulting death. Thus, implicating Aaron.

Avoiding the Aaron problem, the Lardie Court noted that its construction of the OUIL causing death statute, requiring a *causal relationship* between the defendant's state of mind, i.e. driving while *intoxicated*, and the resulting death. Lardie, 452 Mich at 264. Lardie's interpretation of the statute, being analogous to that of common-law involuntary manslaughter, requires a showing of:

A. First, that the defendant was operating a motor vehicle,

B. Second, that he/she operated the vehicle in a grossly negligent manner,

C. Third that the defendant's gross negligence was a substantial cause of an accident resulting in injuries to the deceased,

D. Fourth, that such injuries caused the death of the deceased.

See, CJI2d 16.12. The Lardie Court concluded:

> In comparing this statute to gross-negligence involuntary manslaughter under the common law, we conclude that this statute does not conflict with the basic premise of "individual moral culpability" from the common law articulated in *Aaron* even though it imposes a fifteen-year felony for an act that would only lead to a ninety-day misdemeanor (for a first-time offense) if it did not cause the death of another. The only difference between causing death by operating a vehicle while intoxicated and the crime of involuntary manslaughter with a motor vehicle is that under the common law the people must prove gross negligence, whereas under the statute the people must prove that the defendant

voluntarily drove, knowing that he might be intoxicated. Lardie, 452 Mich at 265-266. Thus, the statute must require a causal connection between the *intoxicated* driving (the wrong) and the injury (the death), to be consistent with our common law understanding of "the basic premise of individual moral culpability that our criminal law is based upon."

If *this Court* were to accept the contrary, that our Legislature chose "causes" to require merely a but-for, cause-in-fact nexus, or that the causation is merely tied to the status of "operating a motor vehicle" and not "*intoxicated* driving" the common law principles it repudiated in Aaron would be offended*!*

But, on the other hand, why would this even matter, as the Lardie Court held that the statute in question is not a codification of the common law? The Lardie Court did announce that its decisions in Aaron and Datema were based on its inherent power to develop the common law, and were not based on any state or federal due process grounds. Or, in other words why can't this Court in construing the statute go beyond the common-law threshold and approach any possible constitutional limitation?

Here, the canon of constitutional avoidance is hard to ignore: "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is ***plainly contrary*** to the intent of Congress" Rust v. Sullivan, 500 US 173;

111 SCt 1759; 114 LEd2d 233 (1991, O'Conner dissent)(emphasis added), quoting, Edward J. De Bartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 US 568, 575; 108 SCt 1392; 99 LEd2d 645 (1988). This doctrine appears to be the strong undercurrent of Lardie: "[c]onsequently, by concluding that this statute is consistent with Michigan common-law principles, we avoid determining what the due process limitations are, if any, on a criminal statute that requires proof of a mens rea." Lardie, 452 Mich at 262, fn. 54.

This Court, too, should recognize that constitutional limitations may be seriously implicated here, and should avoid venturing into lands unknown, as our legislature has not plainly stated to the contrary.[6] *What is plain*, is that there was much practical avoidance of constitutional issues at work in Lardie.

Rather than attempting the difficult, and perhaps impossible, task of defining and applying any constitutional limitation, it is better to follow the Lardie Court's apparent practice of vindicating the Constitution indirectly by applying statutes in a manner that accommodates the needs of both the government and the individual. The assumption that our Legislature legislates against the background of the common-law performs much of this work.

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[6] Given that precise legislative intent of this statute is at issue, *again*, and recognizing the experience of other sister states' struggles with similar statutes' meanings, can it really be plainly stated that our Legislature intended the construction identified in the Lardie concurrence?

If our Legislature disagreed with Lardie, and it has not for nearly nine years, it should (*must?*) be the political body to make this criminal law broader in scope.

E. Constitutional limitations are implicated if this Court were to dispense of the causal formula set forth in Lardie

If this court is satisfied that the plain language of the statute is clear, and consistent with the Lardie concurring opinion, beyond its common-law understanding of "the basic premise of individual moral culpability that our criminal law is based upon," it is difficult to ignore that constitutional concerns are implicated. Defendant-Appellee is aware of at least two federal courts that have reached this issue.

Notably, the Federal District Court for the Western District of Wisconsin identified a potential due process problem involving the abandonment of a proximate cause analysis in a similar OUIL causing death statute. As noted by the Rhode Island Court in Benoit, supra, Wisconsin's statutes have been interpreted to only require a but-for causation analysis - But, their legislature provided an *affirmative defense*, allowing an accused to avoid liability where causation is lacking between the operation and the resulting death. Section 940.09(2), Stats., provides in pertinent part:

> The defendant has a defense if he or she proves by a preponderance of the evidence that the death would have

> occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant or did not have a blood alcohol concentration described under sub. (1)(b)....

In Caibaiosai v. Barrington, 643 FSupp 1007, 1008 (WD Wis., 1986), the habeas petitioner argued that the statute included an element of causation (*contrary to the Wisconsin Supreme Court's view*), that the affirmative defense was unconstitutional, and that the trial court unconstitutionally failed to charge the jury with the affirmative defense instruction. The federal court denied relief. The court noted the petitioner's argument that the state must present proof of a causal connection between the *intoxication* and the death, so to comport with due process, writing:

> Petitioner also suggests that the unfairness of § 940.09 is apparent when this statute is compared to those of other states, because only Florida and Wisconsin permit a conviction for homicide by intoxication without requiring proof of a causal connection between the intoxication and the death.

Caibaiosai, 643 FSupp at 1012. The court then noted that the Wisconsin legislature did not require the government to prove such causation in its prima facia case, *acknowledged the affirmative defense*, and wrote:

> A state's decision about the manner in which it will define a crime is not subject to proscription under the due process clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McMillan*, 106 S. Ct. at 2416; *Patterson*, 432 U.S. at 202. ***It would be fundamentally unfair if § 940.09 dispensed with the requirement that the state prove a causal connection between the defendant's actions and the victim's death.***

> **The state could not impose liability based upon mere coincidence of time and place and defendant's behavior.** Here, however, where the wrongful conduct consists of the combined acts of intoxication and driving, fundamental fairness does not compel the state to prove the causal relationship between the victim's death and each component of the defendant's act.

Caibaiosai, 643 FSupp at 1011 (emphasis added). Eureka! Elimination of causation as between an act and an injury offends due process -- there must be causation beyond an act and "mere coincidence of time and place."

Focusing her due process microscope for closer inspection of the "act," Judge Crabb managed to untangle the wrongful act into (1) intoxication and (2) driving. She concluded that due process did not require a causal nexus independently between each individual aspect of the "combined act." In other words, due process mandates a causal connection beyond cause-in-fact between the wrongful act (combined act of intoxication and driving) and the injury. But, in Judge Crabb's view, there is no due process requirement that the government establish causation between each *independent aspect* of the wrongful act.

In Caibaiosai, it is hard to overlook the importance of the affirmative defense, and its function of negativing liability in situations where the "death would have occurred even if he or she had been exercising due care." This injects an element of causation beyond mere but-for, into the crime. The practical function of the affirmative defense, allowing a legal escape hatch

in unavoidable accidental situations, constitutionally tempered the potentially harsh results and ***fundamental unfairness*** implicated by a statute merely requiring a but-for causation element. Michigan does not provide for such statutory affirmative defense. The Lardie concurrence's interpretation of the statute, merely requiring a but-for analysis offends due process, state and federal, and exceeds those constitutional limitations imposed by the People.

In candor, Defendant-Appellee is also cognizant of a similar habeas action involving the period of Florida's failed experiment where its statute was seen as merely requiring but-for causation. In Armenia v. Dugger, 867 F2d 1370 (Cir. 11 1989), the appellate panel refused to invalidate Florida's absolute liability statute on federal due process grounds, *in perfunctory fashion.* The petitioner was convicted from a drunk driving death. The petitioner argued that the Florida court in Baker, *wrongly* created a conclusive presumption that an intoxicated driver who becomes involved in an accident from which a death ensues caused the death. It is important to recall that the Florida Court, in Magaw, found that the legislature had introduced an element of causation in the *amended* statute, post Baker. Nevertheless, Armenia argued that the causation element had *always* existed in the statutory language, that the legislative amendment was "not a major change," and that

the Baker ruling was "never valid."[7] Armenia, 867 F2d at 1375. The Eleventh Circuit wrote:

> **Although Armenia does not challenge the Florida Supreme Court's prerogative to interpret the statute,** Armenia contends that when the effect is to relieve the state of the burden of persuasion on the causation element of the offense, the result is a denial of due process which does not allow a conclusive presumption of causation, Francis v. Franklin, 471 US 307, 313-17; 105 SCt 1965; 85 LEd2d 344 (1985).

Armenia, 867 F2d at 1374 (emphasis added). The Eleventh Circuit ruled that the State's interpretation did not require causation, and that the statute did not violate federal due process. Armenia, 867 F2d at 1375. Arguably, this decision can easily be seen as resting on federalism grounds. The Federal court was unwilling to invalidate a statute that the Florida Court, in Magaw, had itself already done on the grounds of the amended statutory language. *See*, Armenia, 867 F2d at 1375, fn. 3.

Caibaiosai and Armenia are split on whether due process mandates a causal connection beyond but-for between the intoxicated driving and death in statutes similar to ours. It is impossible to predict how the United States Supreme Court would rule. But, the real point Defendant-Appellee is trying to communicate is that there is a serious constitutional dimension involved here. This

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[7] Justice Boyd filed a dissent in Baker v. State, 377 So2d 17, 20-22 (FL 1979), that would agree with the petitioner in Armenia. Justice Boyd held the Baker majority's interpretation, dispensing with causation, unconstitutional, having no rational basis and violating the Eighth and Fourteenth Amendments.

Court should recognize this, and, *prudently*, avoid it -- like Lardie did.

Armenia, itself, identifies a potential equal protection argument. It rests in challenging the Court's "prerogative to interpret the statute." Armenia, 867 F2d at 1374. The Michigan government consists of three co-equal branches -- The Legislative branch to enact law, Executive to apply law, and Judiciary to interpret lawful enactments of the Legislature. All must act within their constitutional sphere of power, and within the constitutional limitations placed upon them by the People. Here, where: (1) the statutory language is subject to more than one interpretation, (2) eight years have passed since Lardie, (3) the statute has been amended *SEVEN* times since Lardie, (4) our Legislature has not substantively altered the relevant language of the relevant statute sub-part post Lardie, and, (5) there is a total absence of any legislative "fix" -- **the proposition that Lardie correctly communicates our Legislature's intent becomes difficult to seriously question.**

If the legislative intent is sufficiently fixed, by clear unambiguous language, or continued acquiescence in the face of numerous reenactments[8], the proper role of increasing the scope of

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[8] Under the reenactment rule, "if a legislature reenacts a statute without modifying a high court's practical construction of that statute, that construction is implicitly adopted." People v Hawkins, 468 Mich 488, 519; 668 NW2d 602 (2003) (Cavanagh, J., dissenting), citing 28 Singer, Statutes and Statutory Construction

criminal liability should belong only to our Legislature. If this Court expands the scope of potential criminal liability by reversing itself and broadening the statute's scope of potential liability, it could easily be seen as legislating from the bench -- an überlegislature![9]

If this Court is willing to do it, it will result in the unequal application of the law to a class of criminally accused without any rational basis, and would violate our own State Constitution, in that the Judiciary would usurp the role of our Legislature.[10]

Finally, dovetailing beautifully with the canon of constitutional avoidance, the rule of lenity, utilized where there is a doubt about harshness of result, can be applied to harmonize the statute with the Constitution. Statutory ambiguities have long been resolved in favor of the criminal defendants. A court should

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(2000 rev), Contemporaneous Construction, § 49.09, pp 103-112. The Legislature "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it [reenacts] a statute without change . . . ." Lorillard, a Div of Loew's Theatres, Inc v Pons, 434 US 575, 580; 98 S Ct 866; 55 L Ed 2d 40 (1978).

[9] Defendant-Appellee is referencing the introductory "quote," citing The Limited, Inc. v. Commissioner of Internal Revenue, 286 F2d 324, 336 (Cir. 6, 2002), immediately preceding Argument I of the Jackson County Prosecutor's Brief on Appeal, p.3. The passage really states: "While obviously not the policy that the Tax Court would promote were it an uber-legislature...." The prosecutor's "quote" is merely a paraphrase.... Nevertheless, it is well taken.

[10] Such action may also implicate a due process dimension similar to enactment of an illegal ex post facto law.

"not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more that a guess as to what Congress intended." Cordoba, 825 FSupp at 518. The same should apply to this Court.

This Court should decline to interpret the statute to reduce the causation element to a but-for analysis, so as to increase the scope of potential criminal liability. Rather, that job must properly be for our Legislature.

F. Lardie's use of "a substantial cause" as the statutes causation element is consistent with our common-law development of this concept.

Assuming that the statute requires a showing of causation consistent with its common-law development, a point with which the Wayne County Prosecutor appears to agree,[11] Lardie's use of the "a substantial cause" jury instruction language is a workable encapsulation of that concept. This Court in People v. Tims, 449 Mich 83; 534 NW2d 675 (1995) acknowledged that the concept of *proximate cause* in homicide prosecutions consists of two separate inquiries: cause-in-fact and proximate/legal cause. In Michigan, our law has combined these separate inquiries into the single question to the jury: whether a defendant's gross negligence was "*a substantial cause*" of an accident resulting in injuries to the deceased. Nevertheless, underlying the "a substantial cause"

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[11] [Wayne County Brief on Appeal, p. 13].

inquiry, remains a more complex analysis.

"Mankind might still be in Eden, but for Adam's biting an apple." Welch v. State, 45 Ala App 657, 659; 235 So2d 906 (1970)(Recognizing accused not guilty of any degree of culpable homicide, although the victim dies, if the death is caused by some other intervening cause). The present point in this remark is to remind us that the sole purpose of the cause-in-fact or but-for test of causation is merely to identify candidates for the responsibility for an event. It is from this pool, which may include many human actors (and non-human forces) stemming over an extended period of time, the "proximate" or "legal" cause of the social harm must be selected.

This Court, in Tims, grappled with the concept of criminal causation. Tims was a combined case involving two defendants, Tims and Kneip. Tims acknowledged that the contributory negligence of a victim is no "defense" to criminal negligence, *nothing new.* Tims, 449 Mich at 97. Tims also acknowledged, *in Kneip's case,* that contributory negligence of a third party, likewise, is not a "defense" to criminal negligence. Tims, 449 Mich at 99. However, Tims noted that the contributory negligence of others than the accused may properly be weighed by a jury in its function of determining whether the accused's acts were *a substantial factor* in the victim's death. This really was a point of dispute as both Tims and Kneip argued on appeal that they could only be convicted

if their acts were seen as *the cause* of the injuries, not merely *a cause*. Tims, 449 Mich at 95. The majority and the dissent struggled to precisely define a calculus of exactly what "a substantial factor" analysis technically involved, but both agreed that the concept of proximate cause is made up of a combination of but-for causation and a proximate/legal cause analysis.

G. Answering this Court's Proposed Questions:

Thus, this Court's questions can be answered:

(1) Whether the "substantial cause" language in Lardie is consistent with the statute? Yes, as the statute requires a showing of *proximate cause* (see answer to question 3, below), the "a substantial cause" jury instruction language adequately encapsulates the nature of this complex concept. See Tims.

(2) Whether MCL 257.625(4)'s requirement that the prosecutor establish that the defendant's "operation of that motor vehicle causes the death of another person" requires the prosecutor to establish that the defendant's operation of the motor vehicle was affected by his intoxicated state: Yes, as this is general intent statute, this must be a requirement in order avoid offending "the basic premise of individual moral culpability that our criminal law is based upon," as elucidated in Aaron. Further, eliminating such interpretation implicates due process problems and should be avoided, especially in light of the statute's ambiguous nature.

The statute's language easily supports that our Legislature intended any deviation from normal driving due to intoxication to be seen as satisfying Lardie's "gross negligence" common-law involuntary manslaughter analogy. After all, involuntary manslaughter requires a causal nexus between the alleged "gross negligence" and the injury.

(3) Whether the statute obligates the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death: Yes, the statute must be seen as having a proximate cause element, as it is a "term of art," and, in order to avoid offending "the basic premise of individual moral culpability that our criminal law is based upon," as elucidated in Aaron. Further, eliminating such interpretation implicates due process problems and should be avoided, especially in light of the statute's ambiguous nature.

(4) Whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted: No, for the reasons stated in answer to questions two and three.

(5) If so, whether the statute violates the equal protection clause of the Michigan Constitution, Const 1963, art 1, § 2, or the equal protection clause of the federal Constitution, Am XIV, or is otherwise unconstitutional: Yes, inasmuch as these constitutional limitations can be defined. It should be enough to recognize that

a mere but-for analysis will exceed "the basic premise of individual moral culpability that our criminal law is based upon" in light of our common-law, and approach constitutional limitation thresholds. And, at least one federal court appears to agree. In light of our Legislature's continued acquiescence to the Lardie interpretation, and the statute's apparent ability to be subject to more than one interpretation, a prudent Court would decline to abandon the proximate cause element. Rather, such construction should only occur where the legislative intent is ***plainly evident.***

H. "a substantial cause," applied

Both the Tims majority and dissent would appear to agree, under either of their causation analyses, that an unavoidable accident situation, *irrespective of an actor's negligence*, can never be seen as a proximate cause of a victim's injury. Tims, 449 Mich at 101-102. Tims acknowledged this crisply-defined outer limit of causation:

> To the extent that the proposed requirement is intended to prevent drivers from being convicted for homicide for accidents that they could not have avoided, the law has prevented this unjust result for at least a century. **The exacting rules of criminal causation dictate that a driver is not in fact or law the cause of a deceased's death unless the proofs are such that a jury could find beyond a reasonable doubt that the defendant could have avoided the accident.** Absent such proofs, the defendant is entitled to dismissal of the charge, a directed verdict, or an order reversing the conviction.
>
> **The rule that a defendant may not be convicted for**

> **a crime that he could not have avoided has long been settled.** For example, Queen v Dalloway, 2 Cox 273 (CC, 1847) (summarized in Perkins & Boyce, Criminal Law [3d ed], p 787), involved the death of a child who suddenly ran out in front of a horse-drawn vehicle and was killed. The jury was charged that if, by the utmost care on his part, the driver could not have prevented the accident, he must be acquitted.

Tims, 449 Mich at 102 (emphasis added). Further, in People v. McMurchy, 249 Mich 147, 165-166; 228 NW 723 (1930), our Court also cited to Dalloway, writing:

> In Queen v. Dalloway, 2 Cox, 273 (1847, Oxford Circuit, Crown Court), the prisoner was riding in his wagon standing up with the reins loose on his horse's back -- not in the prisoner's hands. The deceased, a child of three years, ran in front of the wagon and was killed. The defendant was indicted for manslaughter. Earle, J., in summing up to the jury directed them:
>
> > "A party neglecting ordinary caution, and, by reason of that neglect, causing the death of another, is guilty of manslaughter; that if the prisoner had reins, and by using the reins could have saved the child, he was guilty of manslaughter; but that if they thought he could not have saved the child by pulling the reins, or otherwise by their assistance, they must acquit him."

Professor Perkins also quoted Daloway in his treatise, Perkins & Boyce, Criminal Law (Foundation Press, 3rd ed., 1982), p. 787, in support of this principle:

> It must not be assumed that negligence of the deceased or of another is to be entirely disregarded. Even though the defendant was criminally negligent in his conduct it is possible for negligence of the deceased or another to intervene between this conduct and the fatal result in such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation....

Hart and Honoré's treatise discusses another case involving facts analogous to the instant situation. Hart & Honoré, Causation In the Law (Oxford University Press, 1985, 2nd ed.). In that case the defendant was driving negligently on the wrong side of the road. The deceased, who was drunk, was riding his bicycle in the opposite direction and at the last moment swerved into the path of the defendant so that there was a head-on collision. On appeal the defendant was acquitted of any culpable homicide because "[i]t cannot be said that the negligence of the driver of the vehicle was the proximate cause of the disaster." Hart and Honoré go on to say, "though contributory negligence is not a defense to a charge of homicide, the action of the deceased was so foolhardy as to negative causal connection between the negligent driving of the accused and the death of the cyclist." Hart & Honoré, p. 350. Hart & Honoré go on to state: "the victim's reckless or grossly negligent behaviour or his voluntary decision to court death or injury may negative causal connection, on ordinary principles, between accused's act and the harm." Hart & Honoré, at 352.

Thus, in unavoidable accident situations, *irrespective of an actor's negligence*, the actor can never be seen as a factual or legal/proximate cause of a victim's injury.

II. WHERE THE PROSECUTION'S TRAFFIC ACCIDENT RECONSTRUCTION "EXPERT" TESTIFIED THAT DEFENDANT-APPELLEE JAMES LARGE'S COLLISION WITH A BICYCLIST WHO

DARTED OUT FROM A HIDDEN DRIVE WAS *UNAVOIDABLE*, IRRESPECTIVE OF HIS 0.10% BLOOD ALCOHOL LEVEL, AND *FAILED* TO PRODUCE *ANY* EVIDENCE SHOWING THAT DEFENDANT-APPELLEE'S DRIVING WAS OTHERWISE GROSSLY NEGLIGENT AND *PROXIMATELY CAUSED* THE FATALITY, THE CIRCUIT COURT CORRECTLY REFUSED TO HOLD DEFENDANT-APPELLEE OVER FOR TRIAL ON BOTH THE MCL §257.625(4), AND THE INVOLUNTARY MANSLAUGHTER COUNT

A. The statutory charge

Cody Otto's act of riding into the roadway from a hidden drive must be seen as an *independent, intervening superceding cause* sufficient to absolve the defendant from liability. People v. Moore, 246 Mich App 172, 176; 631 NW2d 779 (2001); People v. Bailey, 451 Mich 657; 549 NW2d 325 (1996)(Recognizing independent intervening cause, cuts off criminal liability of actor). Here, all of the evidence presented at the preliminary examination, and its permissible inferences, point to a factual situation square with Dalloway, and the Hart & Honoré example - an unavoidable accident.

The Jackson County Prosecutor has argued that "a child darting out into traffic is sufficiently foreseeable," ostensibly creating a jury question on any causation issue. [Jackson County Brief on Appeal, p. 15 fn. 4]. Likewise, the Wayne County Prosecutor, citing to People v. Garner, 781 P2d 87, 90 (CO, 1989) argues that a jury question exists on the issue of the child's intervening superceding act negativing causation. [Wayne County Brief on Appeal, p. 24, fn. 55]. Both are misplaced.

In Garner, the Court recited the operative facts as:

> Garner was driving a pickup truck on a four-lane divided residential street in Colorado Springs. A small group of children was on the median, preparing to cross the street in front of Garner's vehicle. All of the children stopped, except for twelve-year-old Lisa Uhrenic who continued to cross the street. Garner, who was traveling in the left lane of traffic, swerved into the right lane in an apparent attempt to avoid the child but the right front of his truck struck and killed her.
>
> * * *
>
> An investigating officer testified on the basis of skid marks that Garner was driving an estimated 43.39 miles per hour in a posted 35 mile per hour zone. He described the point of impact as four inches from the right side of the vehicle. The officer offered his opinion that, had Garner been traveling at the posted speed limit, the vehicle would have stopped three feet after striking Uhrenic as opposed to the 26 feet which the vehicle actually traveled after the point of impact. *It was the officer's opinion that the accident would have occurred even if Garner had been driving at 35 miles per hour but he could not say whether the death would have occurred under those circumstances.*

Garner, 781 P2d at 88. The Garner Court concluded: "Assuming there was a question as to whether the victim's conduct was gross negligence, probable cause still should have been found and that question decided by the jury." Garner, 781 P2d at 90. The facts here are materially different, necessitating the opposite result.

Cody Otto shot out suddenly and unexpectedly from a hidden drive, depriving Defendant-Appellee any chance of avoiding the accident.

In Defendant-Appellee's case, the only testimony presented at the preliminary examination on this point indicated that by using ordinary care and diligence defendant did not have the ability to

avoid the fatal accident. Deputy Bradley Piros, who was admitted as an expert in accident reconstruction, opined that the accident was inevitable even if defendant had been driving forty-five miles per hour, ten miles-per-hour under the speed limit. (205a). Piros explained how he had performed twelve tests involving the driveway in question and a similar bicycle to the one the victim was riding. Piros determined that the victim was traveling down the driveway at a speed of nine miles per hour and that the distance from the edge of the driveway to the area of impact was approximately thirteen feet. (196a). Piros was then asked:

> Q. And a person traveling at nine miles per hour from the edge of the driveway to the area of impact, how much time transpired from the time that Cody reached the edge of the road until the point she was struck by Mr. Large's truck?
>
> * * *
>
> A. Using the distance of approximately thirteen feet and the speed of nine miles per hour, which if you calculate it in feet per second would be a little over thirteen feet, so approximately one second.
>
> Q. So that calculation basically says from the time Cody reaches the edge of the road until the point she's hit, covering that, traversing that thirteen feet would take approximately a second.
>
> A. Correct.

(196a-197a).

When asked how long it would take a sober driver to perceive a threat on the roadway, Piros stated: "Normal perception time in order to see a threat, realize you have a threat and then decide what you're going to do is around a second a half." (202a). Thus,

Defendant-Appellee would not have had time to react, even if he were sober. Further, Piros testified that, other than the allegation of drinking, he saw absolutely no negligence nor no deviation from the normal driver on behalf of Defendant-Appellee. (206a-207a).

To bind the defendant over, the magistrate must find that there is evidence regarding each element of the crime charged or evidence from which the elements may be inferred. Hudson, 241 Mich App 268, 278; 615 NW2d 784 (2000). **In this case, there was no evidence demonstrating that defendant could have avoided the resulting harm by using ordinary care and diligence.** Based on the above testimony, even if defendant had been driving forty-five miles per hour, and sober, defendant could not have avoided the accident. (196a-197a). Thus, the Circuit Court correctly found that the District Court abused its discretion in binding over defendant on this count; and, the Court of Appeals properly affirmed.

Testimony at the preliminary examination revealed that defendant was driving under the influence of alcohol. (156a) But, as discussed above, testimony also revealed that defendant's intoxicated driving was not a substantial cause of the death.

The prosecution failed to present sufficient evidence to justify a finding that Defendant-Appellee's *intoxicated* driving was a substantial cause of the death. Also, the prosecution failed to

present sufficient evidence to justify a finding that Defendant-Appellee's Driving was a substantial cause of the death. Unless this Court changes the law, the Court of Appeals must be affirmed.

B. The involuntary manslaughter charge

It should be noted that the Circuit Court and the Court of Appeals both held a total lack of evidence to bind over on the involuntary manslaughter count. Importantly, the lower courts held there was sufficient evidence for bind over on the element of gross negligence. Thus, the prior decisions must properly be seen as decisions resting only with the absence of evidence showing that the driving was a substantial cause of accident.

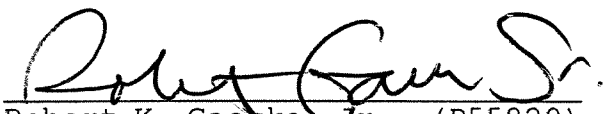
For the very same reasoning as set forth above, the involuntary manslaughter count must fail in this Court, too. The Court of Appeals must be affirmed.

CONCLUSION/RELIEF REQUESTED

It follows from the foregoing that the Court of Appeals must be affirmed.

Respectfully submitted,

Rappleye & Rappleye, P.C



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